TESTIMONY

Presented by

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Before the

Senate Committee on Indian Affairs

On Implementation of the Texas Restoration Act, Public Law 100-89

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Thank you Mr. Chairman and Members of the Committee for the opportunity to present testimony this morning on the implementation of the Texas Restoration Act of 1988. I was pleased to testify on April 2, 2002, before the U.S. District Court for the Eastern District of Texas in the case of the *Alabama-Coushatta Tribes of Texas vs. the State of Texas* [9:01CV299-JH]. This pending case involves the efforts of the Tribes to determine their rights under federal law to conduct gaming in Texas, either under the auspices of the Indian Gaming Regulatory Act or under the Supreme Court holding in the case of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

My testimony before the Court was requested by the Tribes' attorney, Mr. Scott Crowell, and was intended to shed light on the probable intent of the Congress with respect to the interconnection between the Texas Restoration Act ("Act"), the Indian Gaming Regulatory Act ("IGRA") and the *Cabazon* decision.

During the period when Congress was considering both the Restoration Act and the IGRA, I was privileged to serve on the staff of the Senate Indian Affairs Committee and was assigned to the Indian Gaming Regulatory Act. During the 18 months following *Cabazon* when the final language of the IGRA was being developed, the holding in the *Cabazon* case was certainly uppermost in the minds of those of us who worked on both the House and Senate bills. This is so because the *Cabazon* language was unexpectedly strong in favoring tribal regulation of their own gaming operations in those states that allow gaming to be played by any person or entity for any purpose. The civil regulatory/criminal prohibitory test had become a mantra for those of us working on both sides of the Hill and I venture to guess that the same is true for those staff who were responsible for the development of the language of the Texas Restoration Act which was proceeding in the Congress during the same period as the IGRA was moving. I say this because the language of the sections of the Act that was added actually reflects the *Cabazon* language and the language of IGRA that passed just 14 months after the Texas Restoration Act.

To give a short chronology, the bill to restore federal recognition to the Alabama-Coushatta Tribes of Texas and the Isleta del Sur Pueblo Tribe of Texas (also referred to as the

Texas Tiwas) was first considered in the 99th Congress. The House passed the bill on December 16, 1985. The Senate approved a modified version on September 24, 1986. These modifications were to the sections 107 and 207 dealing with gaming by the two Tribes. The Senate's action was vitiated the next day and the bill was returned to the Senate calendar. There was no further action in the 99th Congress.

Rep. Coleman reintroduced the Texas Restoration bill in the 100th Congress as H.R. 318. This version was identical to the Senate version that was passed and vitiated in September 1986. The House passed the bill on April 21, 1987 with amendments related to gaming, no doubt because of the holding in the recently decided *Cabazon* case and concerns by Texas lawmakers about Indian gaming. The bill passed the Senate on July 23 and was signed into law on August 18, 1987, as Public Law 100-89. The Senate had revised the gaming sections of the bill (sections 107 and 207) and the House concurred in the amendments. The language of these sections of the statute clearly reflect consideration of the *Cabazon* decision and the civil regulatory/criminal prohibitory language of that decision. These sections read:

> *"(a) In General.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution R.C.—02-86 which was approved and certified on March 12, 1986.*
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> *"(b) No State Regulatory Jurisdiction.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.*
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> *"(c) Jurisdiction Over Enforcement Against Members.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section*." 25 U.S.C. 13000g-6; see also: 25 U.S.C. 737

Action on the Texas Restoration Act was contemporaneous with consideration of the bill, S. 555, titled the Indian Gaming Regulatory Act. Chairman Inouye introduced this bill on February 19, 1987, at the beginning of the 100th Congress. The Supreme Court handed down the *Cabazon* decision just days later on February 27, 1987.

For some time, it has been my strong belief that the federal courts were in grievous error in 1994 in holding that the Isleta del Sur Pueblo of Texas is not permitted to conduct gaming under IGRA. The Fifth Circuit Court of Appeals decision in the case of *Ysleta del Sur v. Texas*, 36 F.3d 1325 (1994) upheld an opinion of the Western District Court for the State of Texas that the language of the Texas Restoration Act prohibits the Tribe from gaming except as determined by Texas law. This decision will no doubt impact the Eastern District Court's decision in the pending Alabama Coushatta Tribes' case.

I believe this case is wrong on the facts and wrong on the law. I am including here excerpts from a memorandum I prepared for the Tribes' consultant that details some of my concerns. This Memorandum was written in response to another case involving Ysleta del Sur Pueblo that was decided on September 27, 2001 and relied on the 1994 decision for its holding. *See: State of Texas v. Ysleta del Sur Pueblo et al*, No. EP-99-CA0320-GTE 9 (hereinafter "Decision").

> Introduction: The Decision presents a virtual panoply of questions and concerns I will attempt to address singly, with the understanding that there will be inevitable overlap in the discussions. At the outset, I would say that in the Decision the Court ignores many well-established principles in Indian law, particularly vis a vis the relationship of federally recognized Indian tribes and the United States, and places too much emphasis on facts that are not relevant. I cannot say whether that is because of the way the cases were briefed and argued or whether the Court relied much too heavily on a previous decision of the Fifth Circuit Court of Appeals which is faulty at best. See, *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994); hereinafter "*Ysleta I*."
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> Federal/State Jurisdictional Issues: All federally recognized tribes are treated the same as a matter of federal law unless Congress expressly provides otherwise. As a general rule, states and state courts have no jurisdiction over civil and criminal matters tribal lands absent express congressional delegation of such jurisdiction, mostly under PL 280 and similar statutes. Thus, crimes and civil controversies that arise on Indian lands or Reservations are generally subject to the jurisdiction of the United States and concurrently to tribal laws and their courts. The jurisdiction of the Federal government and PL 280 states goes to individuals and the crimes or transgressions they commit; it does not go to the tribal governments with whom the United States has a government-to-government relationship.
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> In this case, the Ysleta Tribe's Restoration Act basically applied a PL 280-like jurisdictional structure for the State of Texas to exercise jurisdiction over crimes and some civil matters on tribal lands. See: Restoration Act, sec. 1300g-4(f). This jurisdiction is no more and no less than any other PL 280 state. Thus, State of Texas laws apply and its courts have jurisdiction over individuals who commit crimes on tribal lands. That fact, however, does not mean the State has civil or criminal jurisdiction over the tribal government itself. There was never any intent expressed by Congress in the Restoration Act to establish the Tribe in the federal family of tribes in any way that is different from all other federally recognized tribes despite the statement on page 27 of the Decision that the "Tribe waived any parallel sovereign status claim" it may have had. There is no distinction in law between the sovereign powers (and sovereign immunity) as between some federally recognized tribes and other federally recognized tribes. Absent a clear and unambiguous indication of an intent on the part of the Congress to treat a particular tribe differently than all other tribes for purposes of sovereignty, a contrary decision is invalid.

PL 280 Jurisdiction and the *Cabazon* decision: Tribes in PL 280 states are able to conduct gaming under IGRA, even though these states have concurrent criminal jurisdiction with tribes over crimes on the reservations. In the case of the Ysleta Tribe, there was a clear intent on the part of Congress that the State of Texas was not to have any special jurisdiction related to gaming. See 1300g-6(b). I am quite certain that because the gaming bill, S. 555, was making its way through the Congress at the same time that the Restoration Act was under consideration, both sections 1330g-6(a) and 1330g-6(b) were drafted by the lawmakers to insure that the Tribe was treated the same as other tribes, particularly since the *Cabazon* case had been decided in favor of tribes just months before the Restoration Act was passed in August 1987.

The Supreme Court decided the case of *California v. Cabazon* in February 1987. The State of California is a PL 280 state and the Court found that since California did not criminally prohibit the gaming in question (bingo) but merely regulated that game, tribes were free to operate that game without regulation by the State. Thus, tribes could conduct "high stakes" bingo on their lands free of state regulation. That is the essence of *Cabazon*. It is also the essence of the language in IGRA to the effect that gaming on Indian lands is valid *as a matter of federal law* when the gaming is *allowed to be played in the state by any person for any purpose*.

IGRA and the Restoration Act: The Court basically finds that because of certain language in the Restoration Act, IGRA does not apply to the Ysleta del Sur Pueblo ("Tribe"). (See: Decision, p. 6 and infra, relying on *Ysleta I*.) That simply cannot be the case, regardless of the *Ysleta I* finding. IGRA was enacted in October 1988, over 14 months after the Restoration Act of August 1987. Had the Congress intended that the Tribe not be subject to the provisions of IGRA, it would have said so. There are numerous specific instances in IGRA where Congress treated certain tribes, and tribes in certain states, differently from all the other tribes covered by IGRA. See: 25 USC 2703(7)(C)(D)(E) and (F).

The decision in the *Cabazon* case set the stage for the language in both the Restoration Act and in IGRA. The revision of section 1300g-6(a) from the original Restoration bill that was introduced in the 100th Congress, is directly attributable to the language and the holding the in *Cabazon* case where the court found that even though California's criminal laws stated that bingo was "criminally prohibited," it was in fact for some purposes permitted to be played and regulated ("civil regulatory" or "permitted"). This was so because the State made exceptions for charitable gaming purposes.

Both the Restoration Act and IGRA provide that tribes cannot engage in gaming that is truly prohibited in the State. *See:* Restoration Act, 1300g-6 ["All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."] and IGRA,

2710(b)(1) ["An Indian tribe may engage in…class II gaming on Indian lands…if—(a) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization, or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)…).] and 2710(d)(1)(B) [class III gaming is lawful when "located in a State that permits such gaming for any purpose by any person, organization, or entity…"].

The reverse of "permits such gaming for any purpose" would be "prohibits such gaming for all purposes." In fact, they mean the same thing. Thus, the question is whether Texas law permits the kind of class III gaming for any entity (including the State) that the Tribe seeks to operate. If it does, IGRA requires the State to negotiate a compact with the Tribe for that gaming. The law of the state in which the tribe happens to be located governs what type of gaming, if any, a tribe can operate. Under IGRA, all tribes are prohibited from engaging in gaming that a state prohibits as a matter of state law; however, if the state merely regulates certain gaming and allows any person or entity to engage in that gaming for *any* purpose, the State must negotiate a compact with the tribe for those games and *may not impose the same regulatory restrictions on the Tribe that it does on the other entities*. For example, the State of Utah completely prohibits all gaming of any kind for all purposes. Tribes in that State therefore have no opportunity to do any forms of gaming.

IGRA is a Federal Preemption Statute: IGRA is a federal preemption statute and thus controls all gaming on lands of federally recognized Indian tribes. See: Section 23 of PL 100-497; codified at 18 USC 1166, 1167 and 1168; also See, *Gaming Corp. of American v. Dorsey & Whitney*, C.A.8 (Minn.) 1996, 88 F.3d 536.

Section 23 provides that for purposes of Federal law, all state laws pertaining to gaming apply on Indian lands except when the gaming on Indian lands is conducted under IGRA. Thus, if gaming is conducted on Indian lands that does not meet the requirements of IGRA, the State's laws will be used to prosecute. Under 18 USC 1166(d): "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe…has consented to the transfer to the State…jurisdiction with respect to gambling on the lands of the Indian tribe." In this case, the Tribe (and the United States) have consented to have the laws of the State of Texas apply to gambling on the Ysleta Tribe's reservation lands. However, under IGRA, those laws govern what gaming is prohibited and if prohibited gaming is being conducted by persons (other than the Tribe) the State may prosecute. Neither the Tribe nor the United States has consented to the jurisdiction of the State over the Tribe's own government.

IGRA – which passed 14 months after the Restoration Act – preempts all actions related to gaming against all federally recognized tribes and provides that only the U.S. Department of Justice may prosecute Indian tribes for alleged violations of state law. The Act makes no distinction between Tribes in Texas and Tribes anywhere else. Had it intended that the provisions of IGRA not apply to Texas tribes, Congress would have so stated.

Sovereign Immunity: The Court's holding that the State of Texas has jurisdiction over the Tribe is not correct. Neither IGRA nor the Restoration Act affirmatively give the State the right to bring any lawsuit against the Tribe in any court of law, state or federal. All federally recognized tribes are governments and as such enjoy the full immunity of the law. See discussion on Jurisdiction, *supra*.

Section 1300g-6 of the Restoration Act says that "Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas" is decidedly not the same as a waiver of the Tribe's sovereign immunity. That waiver must be explicit. The 1300g-6 language only says that violations of the State's gaming law are subject to the "same civil and criminal penalties" as provided by Texas law; it does not say that the State of Texas is authorized to enforce those penalties against the Tribe.

So while the United States may look to Texas law to see what gaming is or is not prohibited (or permitted, as the case may be), there is nothing to support the Court's conclusion that Texas can sue the Tribe.

Tribes are Governments, Not Associations: Despite the Court's findings in the Decision at page 24, there is simply no support in federal Indian case law or in any Act of Congress for the proposition that any federally recognized tribe is anything other than a tribal government, with governmental responsibilities for the welfare of their citizens. They are not clubs or associations.

Statutory Interpretation: If the words in a statute are unclear, courts may find an ambiguity and will look to legislative history for enlightenment. If the words are clear, as they surely are in the Restoration Act, the courts will implement the intent of the law as written. In the Restoration Act, all gaming that is prohibited by the State of Texas is prohibited by the Tribe; the reverse is also true: all gaming that is permitted, therefore, is permitted to the Tribe. In that way, the Restoration Act and IGRA are not mutually exclusive. They can and should be read together but also read in the context of the whole of Federal Indian law.

Summary: Tribes, like the Ysleta del Sur Pueblo, seek federal recognition in order to enjoy the governmental status that all other federally recognized Indian tribes enjoy. The Ysleta Tribe was successful in achieving that status

> and that is why they are the same as other tribes. While the State of Texas does have limited civil jurisdiction over events that occur on reservation lands, it is indistinguishable from – and is in fact akin to – the jurisdiction of other states with jurisdiction under PL 280 or other statutory grants of authority by the U.S. Congress. In the Ysleta's Restoration Act, Congress granted the Tribe recognition as a federal tribe with all the privileges and obligations that come with that recognition. In federal Indian law, some tribes simply are not more sovereign – or less sovereign – than other tribes. They have the same status, no matter how large or small, how many members they have, how big their reservations are, or how or why they became recognized. They each have a government-to-government relationship with the United States; the United States has trust obligations to them, and each enjoys the same immunity and other sovereign attributes as the others.

Suffice it to say that the federal courts in Texas have undermined the sovereignty of the Tribes subject to the Texas Restoration Act by completely ignoring the full implications of what federal recognition is all about. It does not matter whether a tribe is restored or recognized by the Congress or by Administrative action of the Department of the Interior. Both Texas Tribes were restored to federal status by the Congress and nothing in the Act indicates that the Congress intended to have a lesser status than all other federally recognized tribes. There would be little point to restoration or recognition if courts can read into Acts of Congress an intent to differentiate between tribes on basic matters like sovereignty or achievement of their full rights under federal law, including IGRA.

In short, it is my view that the federal courts cannot and should not differentiate among tribes based on such flimsy reasoning as that of the 2001 Decision and that which it cites from the 1994 case. It would seem to be a clear case of judicial activism in which the courts have effectively undermined the intent of the Congress and even the authority of the Congress under the Commerce Clause to determine Indian law and policy. Only the Congress it can correct the courts' errors.